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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. .....

UNITED STATES OF AMERICA,

Respondent,

vs.

MANUEL JACOBS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Manuel Jacobs, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 28, 1970.

OPINION BELOW

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 28, 1970. A timely

petition for rehearing and application for rehearing *en banc* was denied on October 30, 1970, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Was the refusal to sever petitioner from his co-defendants for trial, or to grant him a separate trial on certain of the charges against him, in accord with Federal Rule of Criminal Procedure 8 and Federal Rule of Criminal Procedure 14; if not, could it be harmless error?

2 Was reliance upon the toll records of certain telephone conversations, to sustain petitioner's conviction, proper; and were those toll records properly admitted against petitioner?[1]

STATEMENT OF THE CASE

Petitioner Jacobs is one of six defendants named in the indictment herein [Clerk's Transcript of Record, p. 2].[2] The trial of five of the named defendants—Friedman, Jacobs,

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1. In order to conserve the time of the Court, petitioner Jacobs hereby adopts and incorporates by reference all the questions raised in the petitions of John Roselli, Maurice Friedman, and Benjamin Teitelbaum. Petitioner Jacobs has also omitted the opinion of the court below from this petition, and relies on the opinion as printed in co-petitioners' petitions.

2. For brevity, the Clerk's Transcript will be referred to as "C.T."; the Reporter's Transcript as "R.T."; the indicted defendants, Maurice H. Friedman as "Friedman," Manuel Jacobs as "Jacobs," Victor G. Lands as "Lands," T. Warner Richardson as "Richardson," Filippo Sacco (aka John Roselli) as "Roselli," Benjamin Teitelbaum as "Teitelbaum," and those named as unindicted co-conspirators, to wit: Ernest S. Allan as "Allan," Vernal Varlong (aka William C. Douglas) as "Douglas," Edwin Nathaniel Gebhard as "Gebhard," Alfred Mathes as "Mathes," George E. Seach as "Seach," and Albert Snyder as "Snyder."

Richardson, Roselli and Teitelbaum—commenced June 11, 1968, and on December 2, 1968 the jury returned with various verdicts of guilty as to all five of the defendants [C.T. 1690]. On February 3, 1969, Judgment and Sentence of Commitment were imposed upon Friedman, Roselli, Jacobs and Teitelbaum. Each has appealed therefrom. The jurisdiction of the United States District Court was based upon 18 U.S.C. §§ 3231, 371, 1952 and 2314.

A. The Nature Of The Case

1. The Indictment

Count One—Conspiracy.

The conspiracy as alleged charged one continuing conspiracy from about June 15, 1962 to December 21, 1967, the objects of which were to commit offenses (1) in violation of 18 U.S.C. § 1952 by using facilities in interstate commerce to promote, establish and carry on an unlawful activity, namely, fraudulent gambling[3] in violation of California law, and distribute the proceeds thereof, and, (2) to transport in interstate commerce, securities or money of a value over $5,000, knowing the same had been taken by fraud, in violation of 18 U.S.C. § 2314. It was alleged the activities were to be carried on at the Friars Club, 9900 Santa Monica Boulevard, Beverly Hills, and various devices and persons were to be used at that location, the furtherance and effecting of

3 This phrase, a contradiction in terms, is unknown to California law and the cases under California Penal Code § 332, a theft statute. Jacobs uses the phrase as a shorthand expression for the fraudulent obtaining of money by game, device, sleight of hand, pretensions to fortune-telling, trick, etc. [as applied to the aforementioned allegations of the indictment] as set forth in, and containing the elements of, California law; and by use of the Government's denomination agrees to no other definition.

all of which involved travel in interstate commerce "thus enabling them fraudulently to obtain large sums of money from opposing players, in violation of California Penal Code, Section 332, and after January 20, 1966, also in violation of Beverly Hills Municipal Code, Section 4-5.18, laws of the State of California."

The words: "and after January 20, 1966, also in violation of Beverly Hills Municipal Code, Section 4-5.18, laws of the State of California," were stricken from the indictment upon motion of defendants.

Forty-six overt acts were alleged, ranging in time from January 14, 1963 to July 17, 1967.

Jacobs was named in: No. 23, alleging that on or about April 23, 1963, he sent a telegraphic money order to Gebhard; in No. 26, alleging that on or about April 30, 1963, he played cards at the Friars Club; in No. 27, alleging that on or about May 1, 1963, he obtained from Theodore S. Briskin a check for $520.00; in No. 36, alleging that on or about May 1, 1964, he played cards with Phillip Silver (also known as Phil Silvers), at the Friars Club; in No. 37, alleging that on or about November 16, 1964, he telephoned Gebhard in Miami, Florida; in No. 39, alleging that on or about November 20, 1964, he played cards at the Friars Club; in No. 40, alleging that on or about November 20, 1964, he obtained from Albert Parvin cash in the amount of about $5,000.00; in No. 41, alleging that on or about April 14, 1965, he telephoned Gebhard in Miami, Florida; in No. 44, alleging that on or about May 21, 1967, he played cards with Zeppo Marx at the Friars Club; in No. 45, alleging that on or about June 10, 1967, he played cards at the Friars Club; and in No. 46, alleging that on or about July 17, 1967, Gebhard telephoned

him.

Counts Seven, Nine and Eleven

In each count, Jacobs and Gebhard are charged with the use of a telephone, an interstate facility, in connection with an unlawful activity, namely: A business enterprise involving fraudulent gambling in California in violation of California Penal Code § 332 and the subsequent performance or attempt to perform certain acts in connection therewith.

Counts Eight, Ten and Twelve

In each count, Jacobs is charged with having aided and abetted Gebhard with the use of interstate commerce in connection with an unlawful activity, namely: A business enterprise involving fraudulent gambling in California in violation of California Penal Code § 332 and the subsequent performance or attempt to perform certain acts in connection therewith.

Count Twenty-Four

Jacobs is here charged with falsifying his 1964 income tax return in failing to report income derived from card-playing at the Friars Club.

2. Proceedings

Prior to trial, pretrial proceedings joined in by each defendant[4] included for dismissal, for bills of particulars,

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4 Throughout, an understanding and agreement obtained whereby each and all of the defendants were joined in each and all of the several motions to be made and mentioned above, even though filed separately by a single defendant (except where the content of a particular motion indicates that it is peculiar to one specific defendant) [C T 87/2-11; R T 21/17-30/8]. The agreement extended to objections [R T 901/1-16]

for discovery, for severances, for disclosure of the minutes of the Grand Jury [R.T. 51, 86, 91, 93, 130, 138, 158, 161, 168, 170, 227, 229, 251, 404, 437].

At the conclusion of the Government's case all defendants filed motions for judgments of acquittal, to strike evidence, and joined in motions for severance [C.T. 2087, 2088 (pp. 6 and 7 of Criminal Docket) C.T. 646, 652, 697, 699, 795, 857, 793; R.T. pp. 5748-6014, 6027, 6062, 6085]. Defendant Jacobs filed a Separate Motion to Compel Election [C.T. 822]. Motions for severance and for judgments of acquittal were denied on August 21 and 22, 1968 [C.T. 2089]. Friedman proceeded with his defense, during which he testified in his own behalf. Likewise, Teitelbaum testified and called witnesses in his defense. Upon the completion of the presentation of all of the evidence, November 6, 1968, defendants again filed motions for dismissals and judgments of acquittal, and the motions were granted as follows: Teitelbaum, Counts 20 and 21; Richardson, Count 20; Friedman, Counts 20 and 21; Jacobs, Count 21; otherwise, the motions were denied [C.T. 2090, 2091].

The jury deliberated November 25, 26, 27, returned for deliberations on December 2, 1968 (the 82nd day) and returned with verdicts [C.T. 1686-1690], finding defendants guilty of all counts submitted to the jury for decision as charged [C.T. 2091].

Defendants filed motions for judgment of acquittal after verdicts, for new trial and in arrest of judgment. On January 20, 1969, all motions were denied other than the motion by Richardson for judgment of acquittal, which was granted [C.T. 1762, 1776, 1801, 1797, 1800, 1806, 1807, 1885, 1923, 2091, 2092].

On February 3, 1969, judgment and sentence of commitment was imposed upon Jacobs, total fine, $5,000; total term of imprisonment, four years [C.T. 2093].

STATEMENT OF FACTS[5]

Petitioner Manuel Jacobs is a very good gambler, a professional gambler. He was a long-time member of the Friars Club. The Club is a place where much gambling was and is done. Large amounts of money were and are lost and won at the Friars Club. Petitioner won money.

Petitioner was acquainted with the other actors in this multi-part case. Gebhard, allegedly the second "peek" man, was a "long-time acquaintance" of petitioner (Government's Brief [hereinafter cited as "G.B."] in the court below at p. 29). Petitioner's alleged involvement with the conspiracy was based to a large extent on the existence of records indicating that telephone calls had been placed between phones listed to petitioner and phones listed to Gebhard (G.B. at 32, 35). Further evidence "linking" petitioner to the conspiracy was hearsay statements of co-conspirator Friedman (G.B. at 36, 40; see Appendix B, *infra*). Whether or not some of these statements were even admitted against petitioner is at least doubtful (*see*, Appendix B, *infra*). There were also alleged admissions of petitioner, testified to by co-conspirator and government witness Seach (*compare*, Government's version

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5 The facts of the case are summarized in the opinion of the court below (*see*, co-petitioners' petitions). Co-petitioners have undoubtedly supplied their versions of the facts. Petitioner Jacobs will be brief. Additional important facts are set forth in the opinion of the court below and in Appendix B, *infra*. A 60-page, detailed summarization of the testimony against petitioner is contained in his brief in the court below.

at G.B. 37 with actual testimony, Appendix B, *infra*). Finally, there was evidence that Jacobs had won money. This evidence was directed at proving the tax count (*see*, Appendix C, *infra*).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. Section 605:

> "Unauthorized publication or use of communications.
>
> "Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various

communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress."

Federal Rule of Criminal Procedure 8:

> **"Joinder of Offenses and of Defendants.**
>
> **"(a) Joinder of Offenses.** Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> **"(b) Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

REASONS WHY THE WRIT SHOULD BE GRANTED

1. Federal Rules of Criminal Procedure 8 and 14 Have Been Misunderstood And Misinterpreted By The Courts Below. This Case Presents Several Questions Dealing With Those Rules, Some Of Which Have Resulted In Conflicting Decisions In Lower Federal Courts.

Introduction. Professor Moore has said that "[t]he

ways in which a prosecutor chooses to combine offenses or defendants is perhaps second in importance only to his decision to prosecute." Moore, Federal Practice, para. 8.02(1) (hereinafter cited as "Moore"). The importance of a man's right to be tried alone for the crimes he is alleged to have committed is underscored by the common law guarantee of a separate trial. *See*, Comment, *Joinder of Counts as a Violation of an Accused's Right to Remain Silent*, 41 Temp. L. Q. 458, 462 (1968); Developments in the Law, *Criminal Conspiracy*, 72 Harv. L. Rev. 920, 982 (1959).

The reason for the importance of the posture in which the defendant is brought to trial is clear: "Whether a defendant is tried en masse with many other participants in an alleged crime, or in a separate trial of his own, will often be decisive of the outcome." Moore, para. 8.02(1). The greater the number of joined crimes and defendants, the more likely it is that a man will be convicted. "[A] feeling of collective culpability [may be substituted] for a finding of individual guilt." *United States v. Bufalino*, 285 F.2d 408, 417 (2d Cir. 1960; *see, United States v. Branker*, 395 F.2d 883 (2d Cir. 1969); *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1963).

In federal criminal trials the prosecutor's discretion in making decisions about the joinder of defendants and crimes is limited by Rule 8, governing misjoinder, and by Rule 14, giving to the court the job of severing where there is *prejudicial* joinder; by a limited number of decisions of this Court, principally *Bruton v. United States*, 391 U.S. 123 (1969); *Shaffer v. United States*, 362 U.S. 511 (1960); *Opper v. United States*, 348 U.S. 84, 94, 95 (1954); and

Kotteakos v. United States, 328 U.S. 750 (1945); and by a large number of many times disparate decisions of lower federal courts. Professor Moore has said about Rule 8 that no other "Federal Rule has given rise to so much misunderstanding." Moore, para. 8.02(1); *see, United States v. Agueci, supra*, 310 F.2d at 840. The vices inherent in the *conspiracy* crime, when combined with the difficulty in construing Rules 8 and 14, make it even harder to construct an economic, non-prejudicial and understandable rule governing joinder. *See, e.g.*, Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 Harv. L. Rev. 276 (1949). Petitioner Manuel Jacobs submits that this case raises some of the problems which, with increasing frequency (Moore, para. 8.06(2)), cause confusion in lower federal courts and, as here, deprive a defendant of a fair trial.

Misjoinder of Offenses. As set forth above in the statement of the case, petitioner was, in addition to the "gambling" charges, charged with one tax count, a violation of 26 U.S.C. § 7206(10). The initial question raised by the joinder of this offense with the others charged against petitioner is whether the joinder is governed by Rule 8(a) or 8(b). It is not clear from the language of the Rule. Professor Moore, the court below, and many other federal courts hold that Rule 8(b) governs. Moore, para. 8.06(1) at 8-23. But several decisions have overlooked the difference between Rule 8(a) and (b) and have assumed that offenses of a similar character could be joined against multi-defendants. *E.g., Gajewski v. United States*, 321 F.2d 261 (8th Cir. 1963); *see*, Moore, para. 8.06(1) n. 4.

Assuming 8(b) to be applicable, one finds, according to

Professor Moore, that neither the language of 8(b) nor the note of the advisory committee are particularly helpful in determining what *it* means. Moore, para. 8.02(1) n. 1; para. 8.06(2) at 8-31. The decisions of lower federal courts seem to verify this claim.

United States v. Granello, 365 F.2d 990 (2d Cir. 1966), held it impermissible to join charges against two defendants for failing to report income simply because they had earned the unreported income in a joint business activity. The court below, relying on *Evans v. United States*, 349 F.2d 653 (5th Cir. 1965), *Daley v. United States*, 231 F.2d 123 (1st Cir. 1956), and *Turner v. United States*, 222 F.2d 926 (4th Cir. 1955), distinguished *Granello* because the method in which the defendants had gained the money which they allegedly had failed to report was not illegal. It is difficult to see how the method in which the income is earned should have any such impact on the decision to join defendants. Considerations involving "trial economy," *Baker v. United States*, 401 F.2d 958, 971 (1968), would appear to be the same in both cases. And prejudice to the defendant by a joint trial would seem *less* where the unreported income is not earned by illegal means. The decision below, petitioner submits, is in direct conflict with *Granello*.[6]

Misjoinder of Defendants. Petitioner was charged with being a member of one large conspiracy. But the facts show

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6 It should furthermore be noted that the indictment did not require that the income be from illegal gambling, that the evidence did not show that the money was obtained from illegal gambling, and that the prosecutor argued to the jury that it did not need to find the money to be from illegal gambling in order to convict (R.T. 14473). Indeed, the evidence that the money was earned was more of a joke than "proof." *See*, Appendix C, *infra*.

that there was a substantial difference between the earlier part of this alleged single conspiracy and the latter part, that part in which petitioner is alleged to have participated. This, at least, was the view of the court below:

> "Jacobs became involved about the time Mathes and Seach, the two government witnesses who participated in the scheme were leaving. Most of the evidence relating to Jacobs' participation is therefore circumstantial." (*See*, Opinion annexed to co-petitioners' briefs.)

Additionally:

> "There was a marked difference in the detail and directness of the proof relating to the early and later periods." (Opinion.)

Petitioner maintained that if the evidence showed his involvement in a conspiracy at all, it was a different one than that which the Government charged and proved. The court below answered this assertion by saying that the determination of the number of conspiracies was a jury question and had been resolved against petitioner. Petitioner questions this result.

The jury cannot be given the task of deciding such a question. *See, Bruton v. United States, supra,* 391 U.S. 123. The decision of the court below misconceives the importance of keeping from the jury evidence which is not relevant to the offense alleged to have been committed. *Bradley v. United States,* 420 F.2d 181 (D.C. Cir. 1969).

> "[W]hat is primarily involved in cases like *Kotteakos* is not a matter of variance, but the propriety of joinder. That the offenses were 'distinct and separate' indicates that they were not part of the

> same series of transactions within the meaning of Rule 8(b). Had separate conspiracies been alleged in the original indictment, defendants would have been entitled to compel election or severance on the ground of misjoinder."

Moore, para. 8.06(4); *see, United States v. Goss*, 329 F.2d 180 (4th Cir. 1964). Misjoinder raises an issue of *law*. *Tillman v. United States*, 406 F.2d 930, 933 n. 5 (1969).

This treatment by the court below of petitioner's claim that there was variance and misjoinder was perhaps fostered by this Court's decision in *Kotteakos*.

> "[T]he *Kotteakos* analysis traps a defendant in the uncertain and unsatisfactory realm of harmless and prejudicial error—uncertain, because his fate hangs on a subjective judgment of the appellate court and unsatisfactory, because the joinder of separate conspiracies not part of the same 'series' is itself conclusively prejudicial. A re-examination of this problem by the Court seems to be called for."

Moore, para. 8.07(4) at 8-46.

Prejudicial Joinder of Defendants and Offenses—Rule 14.

To speak of prejudicial joinder under Rule 14 is to assume that there was no misjoinder under Rule 8. Rule 14 appears to have been written because it was understood that there might be joinder of defendants or offenses permissible under Rule 8 which were still prejudicial and called for severance.

However, "the way the Rule is administered by the

courts is to assume that if joinder is properly pleaded under Rule 8 then joint trial should follow." Moore, para. 14.02(1) at 14-4; *see*, Walsh, *Fair Trials and the Federal Rules of Criminal Procedure*, 49 A.B.A.J. 853, 856-57 (1963). This administration of the Rule, in light of what appears to be its purpose, appears wrong. Nevertheless, "[t]he determination of the elusive criterion of prejudice . . . is virtually unreviewable." Moore, para. 14.02(1) at 14-3; *see, Opper v. United States, supra*, 348 U.S. 84; *compare, Bruton v. United States, supra*, 391 U.S. 123.

The position said to be most prevalent seems to have been taken by the court below. Petitioner's contention that there was prejudicial joinder was met with the reply: "We find no abuse of discretion here." (Opinion.)

There exists no consensus among the courts below on the considerations relevant in determining prejudice. However, several matters which have caused concern are present in this case. They are, in part, as follows:

1. **The length of the trial.** The trial began on June 11, 1968, and was submitted to the jury on November 22, 1968, after 78 days of trial. This fact was noted by the court below in its opinion: "The extreme length of the trial was in large part because of the elaborate and exhaustive defense." The Government took from June 11 to August 13 to present its case. The Government's case fills 6,000 pages of transcript. It is true that this was not the longest federal criminal conspiracy case in history. *Compare, United States v. Dardi*, 330 F.2d 316 (1964). But the length of trial should quite clearly be taken into consideration. *See*, Moore, para. 14.-04(1) at n. 11; *Second Circuit Judicial Conference Panel Discussion on the Problems of Long Criminal Trials*, 34 F.R.D.

155 (1963). Also, it seems odd that a defendant's (or perhaps his co-defendants') desire to put on a full defense should be turned against him.

2. The disparity in evidence against the co-defendants. This fact was noted but not discussed by the court below. *Compare, United States v. Kelley*, 349 F.2d 729, 756-59 (2d Cir. 1965); *McHale v. United States*, 398 F.2d 757 (D.C. Cir. 1968); *United States v. Agueci, supra*, 310 F.2d 817; *United States v. Bentvena*, 319 F.2d 916 (2d Cir. 1963); *see*, Samuels, *Separate Trials*, 1966 Criminal L. Rev. 303, 307.

3. The presentation to the jury of evidence not admissible against a particular defendant or relevant to a particular offense. This kind of prejudice has certainly not gone unnoticed. 1966 Committee Note to Rule 14; *Bruton v. United States, supra*, 391 U.S. 123; *Jackson v. Denno*, 378 U.S. 368; *Krulewitch v. United States*, 336 U.S. 440 (1949) (concurring opinion of Jackson, J.); *Delli Paoli v. United States*, 352 U.S. 232 (1957) (dissenting opinion); *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1962) (Hand, J.); G. Williams, Proof of Guilt 249 (2 ed. 1962). But the court below seems to have given it little consideration. It is difficult to understand the assertion that "all evidence admitted at the joint trial . . . would have been admissible at a separate trial of the conspiracy and substantive charges under sections 2314 and 1952" (Opinion). *See*, R.T. 6037-6051. And the statement that "the greater part of the proof relating to the rigged games would also have been admissible at a separate trial of the tax charge of each individual defendant" is still harder to grasp. As petitioner understood the indictment, the proof, and the argument to the jury, the manner in which he acquired the income allegedly not reported was irrelevant. *See*, note 6, *supra*.

Harmless Error.

The court below concluded that Federal Rule of Criminal Procedure 52 is applicable to misjoinder, and that any misjoinder was harmless. In so holding, the court followed *Baker v. United States, supra*, 401 F.2d 958, and *United States v. Granello, supra*, 365 F.2d 990. These decisions conflict, at least in Professor Moore's view, with a proper view of misjoinder, Moore, para. 8.04(2), and with prior decisions, *e.g., Ingram v. United States*, 272 F.2d 567, 569-70 (4th Cir. 1959); *Metheany v. United States*, 365 F.2d 90, 95 (9th Cir. 1966); and *Cupo v. United States*, 359 F.2d 990 (D.C. Cir. 1966); *see, also, United States v. Varelli*, 407 F.2d 747-48 (7th Cir. 1969).

2. There Exists A Conflict Between Different Decisions Of The Court Below Regarding The Proper Use Of Telephonic Toll Records. Any Use Of Such Records Raises Important Questions Under The Fourth Amendment And Under 42 U.S.C. § 605.

The case against petitioner was based largely on the records of calls between numbers listed to him and numbers listed to another member of the alleged conspiracy. There was no proof that petitioner made those calls, that the co-conspirator received them, and no proof of the content of the calls. Petitioner maintains that the decision in this case is in conflict with other decisions of the Ninth Circuit Court of Appeals. *Osborne v. United States*, 371 F.2d 913 (9th Cir. 1967); *United States v. Johnson*, ... F.2d ..... (No. 25,635, 9th Cir., Sept. 4, 1970).

Moreover, petitioner maintains that the introduction

of the telephone toll records violated 42 U.S.C. § 605 and petitioner's Fourth Amendment rights.

The Fourth Amendment rights of a man are violated when some reasonable expectation of privacy is unreasonably invaded by the government. *Katz v. United States*, 389 U.S. 347 (1967). A man's expectation that the conversations he conducts over a telephone will remain free from governmental examination is reasonable, even where that phone is a public one. *Id.* Is it reasonable for an individual to assume that the government can gain access, at any time, to the telephone numbers which he has called, the people to whom those numbers were listed, and the exact time the call was made? Does the post office keep a listing of all the persons to whom one writes? *See, LaMont v. Postmaster General*, 381 U.S. 301 (1965).

The telephone is as vital a communications link today as were the "papers," the seizure of which Lord Camden condemned in *Entinck v. Carrington*, 19 Howell's State Trials 1153, 1166 (1763):

> "Papers are the owner's goods and chattels; they are his dearest property; and they are so far from enduring a seizure that they will hardly bear an inspection; and though the eye can not by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect."

The Court has recognized that the Fourth Amendment requires particularly solicitous protection to be given where governmental intrusion will impair values protected by the

First. *E.g., Stanford v. Texas*, 379 U.S. 476 (1965); *Boyd v. United States*, 116 U.S. 616 (1886); *see, generally*, Comment, *Privacy and Political Freedom: Application of the Fourth Amendment to "National Security" Investigations*, 17 U.C.L.A. L. Rev. 1205, 1211-17 (1970). Petitioner maintains that the government has no right to discover, at its discretion, the persons with whom he associates. A man should not have to communicate by telephone at his own risk.

The constitutional question need not be reached. Section 605 creates two classes of persons. The first clause applies, by its terms, only to those employees involved in the actual transmission of communications, *i.e.*, those employees to whom the communications necessarily become known. *Nardone v. United States*, 302 U.S. 379. The second clause applies to all those not included in the first class. Members of this second class are forbidden to intercept or divulge the communication under any circumstances.

This analysis of section 605 has been followed in the Fifth, Seventh and Ninth Circuits. *Hanna v. United States*, 393 F.2d 700 (5th Cir. 1968); *Bubis v. United States*, 387 F.2d 643 (9th Cir. 1967); and *Dote v. United States*, 371 F.2d 176 (7th Cir. 1966). Under the rationale of these decisions, calls made through direct dialing are inadmissible since there are no employees involved in the transmission to whom the communication could become known. As was noted in *Dote v. United States, supra*, 371 F.2d at 181, the mere ringing of a telephone is protected from interception, and thus, *a fortiori*, the existence of a completed call is equally protected.

The Second Circuit has come to the contrary conclu-

sion that such toll slips are admissible. *United States v Covello*, 410 F.2d 536 (2d Cir. 1968). The court in *Covello* reasoned that records kept in the ordinary course of the company's business were exempt from section 605, and mentioned that toll slips had been admitted by the Ninth Circuit in *Bubis*, although obtained through monitoring. The Second Circuit apparently failed to consider that both the Seventh and Ninth Circuits had created an exception in the case of prosecution for a fraudulent use of the pen register–an interpretation consistent with the section 605 rationale of protecting the integrity of the telephone company. The court in *Bubis* explicitly noted that the toll slips were only admissible in the fraud prosecution and not in a contemporaneous gambling prosecution (387 F.2d at 678 n. 5).

CONCLUSION

For the foregoing reasons, the requested writ of certiorari should be granted.

Respectfully submitted,

MARKS, SHERMAN and LONDON

MORGAN, WENZEL, LYNBERG, STEARNS & MORRIS

BY: BURTON MARKS, ESQ.

Attorneys for Petitioner Jacobs.

APPENDIX

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Office of the Clerk, United States Court of Appeals for the Ninth Circuit, U. S. Court of Appeals and Post Office Building, 7th & Mission Streets, P. O. Box 547, San Francisco, California 94101.

Sept. 28, 1970

Re: No. 24220, USA v. John Roselli
No. 24289, USA v. Maurice Friedman
No. 24290, USA v. Benjamin Teitelbaum
No. 24300, USA v. Manuel Jacobs

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered reversing as to Friedman on account 19; otherwise affirming the judgment or order of the court below (or administrative agency). You have 14 days from this date to file a petition for rehearing if you wish to do so.

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Wm. B. Luck,
Clerk of Court

APPENDIX B

Testimony of George Emerson Seach

The testimony of George Emerson Seach, the circumstances of the offering thereof and its admission, and subsequent discoveries by defendants as to true circumstances surrounding Seach's telephone calls set the tenor of the case against defendant Jacobs.

In the course of ordered and chronological proofs as to the remaining defendants, and at a time when there had been no other evidence introduced against Jacobs, the Government was permitted to go forward in time *two years*, to July 5, 1966, to ask one question concerning a conversation between Seach and Friedman, for the purpose of then eliciting three alleged telephone conversations between Seach and Jacobs, involving a

third year's leap forward in time to 1967; to *return* and elicit the balance of the Seach-Friedman July 5, 1966 Las Vegas conversation, and then to *move forward over a year,* to September, 1967, to elicit the Friedman-Seach conversation of that time, which was admitted into evidence under the strange circumstances herein detailed.

The proceedings are set forth in full because they are of the most importance to this defendant.

Seach testified:

I had a particular conversation with Mr. Friedman, I believe July the 5th, 1966, in Mr. Friedman's office in Las Vegas.

> "Q. Now, we are going to have to take you out of chronology again. I ask you, though, at that time did you receive from Mr. Friedman a telephone number at which to call Ricky Jacobs'" [R. T. 997/7-14]. [1]

---

[1] OFFER OF PROOF.

The Government made an offer of proof that at the suggestion of Friedman Seach called Jacobs on the telephone at his home number. He answered, 'This is Ricky Jacobs', and discussed with Seach the Friars Club, that nothing was happening there now and didn't need Seach there now, but Jacobs was going to New York and he would like Seach to come there and put in peepholes so they could do business there." [R. T. 806/23-807/4; 809/7-8].

OBJECTIONS TO OFFER OF PROOF AND INITIAL QUESTION: [R. T. 807/15-808/1; 808/10-13; 808/23-25]. [R. T. 809/18-23]. [R. T. 812/1-813/5; 813/11-15]. [R. T. 997/15]. [R. T. 1017/20-22; 1018/16-18].

> "Mr. Morgan: It is an extrajudicial statement by two people in Las Vegas. There hasn't even been the suggestion of a conspiracy involving Ricky Jacobs.
>
> The Court: You don't have to go into that.
>
> Mr. Morgan: I do, your Honor.
>
> The Court: I understand that Jacobs has not yet been implicated. I understand that." [R. T. 1018/16-22].

After further objections[2] the witness resumed:

"Q. With that interruption, Mr. Seach, I return your attention to a matter we were discussing before the afternoon recess which, as I recall it, was the conversation with Maurice Friedman on or about July 5, 1966, and I has asked you and you said he gave you a phone number. Let's go back to that.

At the time you saw Mr. Friedman in Las Vegas on July 5, 1966, sir, and you said he suggested you call Ricky or Al Mathes, did you obtain a phone number from him after which you called Ricky?

A. Yes, I did.

Q. Did you in fact call that number at some later time and ask for Ricky? A. Yes, I did." [R. T. 1035/8-18].

"Q. About when was that? A. I first called the number approximately July 17, 1966.

Q. Did you at that time ask for Ricky Jacobs? A. I did.

Q. What occurred after you asked for Mr. Jacobs?" [R. T. 1036/4-11].

Counsel was allowed to conduct a *voir dire* examination which developed that prior to July 17, 1966, the witness, Seach, had never met Ricky Jacobs [R. T. 1936/16-18], but that he had heard Ricky Jacobs' voice approximately August of 1962 in the Friars Club [R. T. 1037/4-21]; *that he would not be able to associate the voice* in August of 1962 with the voice in July of 1966 [R. T. 1037/22-25]; in August of 1962, at approximately 3:00 in the afternoon while in the ceiling of the Friars Club, he saw the top of Rocky Jacobs' head, heard his voice and Maurice Friedman told him that was Ricky Jacobs [R. T. 1038/2-20], *that he*

[2] OBJECTIONS: [R. T. 1020/20; 1021, 1022, 1024, 1025].

could not connect the voice he heard in 1962 as being similar to the voice he heard in 1967; that his voice may have changed. [R. T. 1038/24-1039/3]; that he does not recall the number he called; that he has it written in an address book among his possessions [R. T. 1039/4-8]. (Italics supplied).

The witness resumed:

"Q. Would you, Mr. Seach, relate the conversation that occurred after phoning Ricky Jacobs as of July 17, 1966? A. I told Mr. Jacobs I was in Las Vegas just recently and had a conference with Maurice Friedman and he told me to call him in regard to playing cards at the Friars Club. He said, 'I know all about you and who you are.' He said the games had slowed down and there wasn't nothing much doing at the Friars Club. I said, 'I understand Pete was there.' He said, 'Yes, but he is gone. He has been gone quite some time': He said, 'I would like to get together with you tomorrow and talk to you.' I said, 'I must return to Palm Springs this afternoon. However, I will call you on my next visit to Los Angeles.'"[3] [R. T. 1039/14-1040/7].

The Witness resumed:

"Q. Was there any further conversation on July 17th over the phone with Mr. Jacobs? A. No, there was no other conversation.

Q. After that conversation, sir, did you have occasion to speak with him again, either in person or by phone? A. I called him again on the phone on May 28, 1967.

---

[3]Motion to strike: incompetent, irrelevant, immaterial hearsay, no foundation for the recitation of that conversation if that is in its entirety [R. T. 1040/10-14].

RULING: Overruled [R. T. 1040/17/22; 25; 1041/2].

Q. Did you call him at that same number? A. Same number.

Q. What was your conversation at that time?

The Court: This is almost a year later?

Mr. Nissen: May 28th—what—1967?

The Witness: Yes.

Mr. Nissen: Yes, sir, almost a year." [R. T. 1041/4-22].[4]

"A. I apologized to Mr. Jacobs for the fact I hadn't been able to call him sooner. I told him I had been doing some traveling and that I would be interested now in getting together with him, because at this time I was living in the Los Angeles area, whereas at the time I had talked to him initially I was living in the Palm Springs area.

So he begged off and said he was very sorry, that he had some people in town from New York and had to entertain them over the holidays. He said he would call me the following week, and that we would have lunch together and have a talk. That was the termination of that conversation.[5] [R. T. 1045/15-1046/14].

"Q. Did you speak to him again, sir? A. I did speak to him approximately a week or ten days later.

Q. In what fashion?

---

[4] OBJECTION: Incompetent, irrelevant, immaterial [R. T. 1041/23-1042/3; and 13-16; 1043/5-22].

OFFER OF PROOF: That the status at the "Los Angeles location did not call for Seach's services at this time, but that Jacobs has other plans for him and he would like him to take a look in New York and do some work." [R. T. 1044/1-4].

OBJECTION: Prejudicial; remote [R. T. 1044/5-21].

RULING: Based upon the offer of proof *I will permit the testimony* [R. T. 1045/4-6].

[5] *Motion to strike:* immaterial and irrelevant to any issue in the case.

RULING: Overruled [R. T. 1046/19-22].

The Witness: Perhaps it was two weeks after May 28th, because I had waited a week for his call and he had neglected to call me, so I returned the call. I didn't return the call, but I initiated another call.

By Mr. Nissen:

Q. To the same number, sir? A. To the same number. And I told him I had been playing a very high hand in Las Vegas and I was interested in talking to Pete Gebhard in reference to a business deal. And he said that—rather, he asked me how high I was playing, and I told him I was playing $100.00 and [illegible] condition pan and other games.

He said, 'Well, if you think you are going to put a peek in for that kind of money', he says, 'you can put me up there'.

I said, 'No, I don't think you are qualified. I would rather talk to Pete about it'.

I then mentioned the fact I had been in New York approximately a year before and that they were playing very high in New York.

And he said, 'Yes,' he says, 'I was back in New York and I talked to Miami Red and he told me he had somebody looking the place over in New York. Was that you?'.

I said, 'Yes, that was me'.

He said, 'But I understand you couldn't do anything there'.

I said, 'That is right. I spent a week there, but I intend going back. It still has a possibility'.

He then said, 'I have several other places in New York where they play real high.' He said, 'The games at the Friars Club would seem cheap compared to the games in the New York area'. And that he was able to play in all the games if I could put in the installation and do the work.

I said, 'Well, I can do that'.

I then mentioned the fact that I was going to try to talk to Gebhard about coming West, and he said, 'I don't think he will even come out because at this time I happen to know he has an awful lot of money and I don't think he would be interested'.

He said, 'But I am tied up with a litigation involving my pan operation and if we get a negative decision I would be very interested in going to New York with you'.

He suggested that I call in—and I was aware of the fact there had been some determination of the pan litigation.

Q. That is the end of that conversation? A. The end of that conversation" [R. T. 1046/15-1049/3].

The witness Seach testified further concerning the Seach-Friedman conversation of July 5, 1966, in Las Vegas, Nevada:

At the same time he also asked me if I had talked to Mr. Mathes and I said I hadn't talked to him for quite a while. He asked me if I had Mr. Mathes' number in Palm Springs, and I said no. Thereafter he wrote Mr. Mathes' number on a piece of paper and also Mr. Jacobs' number. I then asked him, "What has been going on at the Friars Club?" I told him that I heard Ricky and Parvin were playing very high klab, at a thousand a game. He said, "That is all over." He said, "They are finished." I said, "Well, Pete must have been there." He said, "He is gone. He is finished. He went back East."

By Mr. Nissen:

"Q. That Pete is who? A. Pete, Pete Gebhard. He then said I should call Ricky or Al and get in touch with them in regard to perhaps starting to play at the Friars Club again.

Q. Was there any conversation about where they were now playing in the Friars Club, so far as floors go? A. Oh, he did tell me that they had moved to the third floor, and I asked him if Ernest Allan was still there. He said, 'No, he is gone.' He said, 'But call Ricky, and there is a new manager at the Friars Club that was an assistant to Ernest Allan and he knows where all the peeks are and they are already in and ready to go. And he will show you where they are. So get in touch with Al or Ricky.'

Q. Was that the end of that conversation? A. That was the end of that conversation."

Without the introduction of further evidence as to Jacobs the Court held there was sufficient evidence [of Jacobs' involvement] not to make the admonition with respect to Mr. Jacobs [R. T. 1080/23-25] and to justify hearing testimony with respect to what other co-conspirators did as implicating Jacobs as well [Also R. T. 1123-1124].

The following testimony of the witness George Emerson Seach was offered against defendant Friedman only:[6]

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[6] This is unquestioned of record and although later treated as if in evidence against Jacobs [R. T. 1128/21-23; 1134/11-20 ("Your Honor, before we elicit what occurred, may I just repeat what I have said, that we are offering this against Mr. Friedman . . .")]; Court repeats instruction immediately prior to conversation "I recognize this is offered only against Mr. Friedman (but hearsay)" [R. T. 1142/3-7]; Court "mindful" [R. T. 1142/23-24]; Even after ruling, "but here this evidence is not offered with respect to Jacobs" [R. T. 1153/22-23]; and, finally,

"Mr. Hunt: If I understand your Honor's ruling, if I understand it correctly, I understand that this evidence is admissible as against Friedman only.

The Court: It is offered as against Friedman only, yes.

Mr. Hunt: Yes, and that was the purpose for which it was admitted.

The Court: Yes.

Mr. Nissen: The Government offered it to try to save

"Q. Now, I direct your attention further ahead, which will be approximately September (1967), and I ask you if you had occasion to be at Maurice Friedman's house when he received a telephone call in September? A. Yes.

Q. Tell us about when that was and who was present and what happened. A. September 18th I received a call from Los Angeles. Mr. Friedman requested me to come to Las Vegas as he wanted to talk to me. So I told him I would be up the next day, which was September 9th. I did arrive in Las Vegas and I proceeded to Mr. Friedman's house.

Q. Who was there when you got there? A. I believe his wife was there, but she left the room and Mr. Friedman and I were alone in the living room.

Q. Now, will you tell us what happened when you and Mr. Friedman were left alone and what occurred? A. So we sat in the living room and he said, 'Our bargain still stands.' He said, 'Forget about Mathes.'

Thereupon the phone rang and Mr. Friedman answered the phone and he had a discussion. Mr. Friedman said, 'when was he served?' And then they started talking in Jewish. So Mr. Friedman then hung up the phone and I said, 'Who was it?' He said, 'It was Ricky.' He said, 'He just told me that Al Snyder had to go before the Grand Jury.' So, I said, "Why does Snyder have to go before the Grand Jury?' He said, "Well, when Ricky was playing Parvin klabiash Pete was playing with him.' " [R. T. 1140/1-1142/1].

OBJECTIONS: [R. T. 1142/3-7; 1144/23-1145/5; 1145/7-1146/5; 1145/6-13 (Hearsay, immaterial, high-

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objections. I don't think we succeeded. I suppose we should offer it as against all, but I am going to leave it as it is." [R. T. 1154/6-17].

ly prejudicial to Jacobs; if not offered for truth, immaterial; cumulative as to Friedman and highly prejudicial, respectively)]

RULING:

All objections to such testimony or motions to strike, overruled or denied:

(1) testimony is clearly admissible as to Friedman;

(2) as to whether such testimony inherently unduly damaging to Jacobs, concluded that such testimony would be admissible even if it were offered as to Jacobs as the court finds the declaration was made, (a) during the existence of the conspiracy (attempt to keep the conspiracy secert)—(b) in furtherance of the conspiracy (attempt to keep secret) and (c) sufficient evidence independent of the hearsay declaration present that the conspiracy existed and that Jacobs was involved. [Mr. Seach's testimony as to Jacobs's own declaration that would indicate a participation in the general conspiracy. [R. T. 1151/21-1153/8],[7]

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[7] Prior to the below argument of Government, Court stated the testimony was *cumulative as to Friedman, if offered only against him and if not offered against him improper as to Jacobs.* [R. T. 1142/23-1143/8] and *there was no effective way the Court could limit the proof so that the jury would disregard it so far as Jacobs is concerned* [R. T. 1145/3-6],

ARGUMENT:

We are willing to say we are offering it against Friedman [to avoid objection] Your Honor says it is cumulative. You have heard a good bit of testimony about Friedman. I know what is coming in the future, sir, and I must say that we are not going to be able to show, by physical evidence, Mr. Friedman meeting with Mr. Gebhard and Al Snyder with regard to Friars Club. The only conversation we have is this one.

If we can't show [illegible] is aware of the deals of Gebhard and Snyder we are being cut off from proving the subsequent part of the conspiracy.

"Gebhard is not going to testify—let me represent that Gebhard told me he worked [illegible] holes in the Friars Club for Friedman. He told me also the other day he is irritated with me and he doesn't care what I do, he is not going to testify. I said, 'The court will order you to.' He said, 'I don't care what the court orders.' We don't think we are going to get it in, your Honor." [R. T. 1143/16-114/16].

Following the aforementioned lengthy objections argument and ruling, Seach was permitted to continue:

"Q. Mr. Seach, as I recollect it, before the lunch hour we asked you about the conversation you had at Mr. Friedman's house approximately September 9, 1967, and you had just finished stating about he having spoken on the phone to someone and having hung up and was then talking to you.

"Take it from the time Mr. Friedman hung up the phone and tell us what was said between you. A. I asked Mr. Friedman who had called, and he said *'that was Ricky.'*

I said, 'Wat did he want?' He told me that he had just related to him that Al Snyder was subpenaed and was to testify before the Grand Jury. So I said, *'Why do they want Snyder?' And he said that he was upstairs working with Pete. He said that Ricky was playing Parvin* and Pete was helping him, but that Pete couldn't play klabiash too well and they got stuck some money and then they had to get *Al Snyder to go up and work with Pete and help him, because he was a good klab player and had Snyder work the peep"* [R. T. 1157/17-1158/14].

APPENDIX C

Testimony Relating to Ricky Jacobs, Count Twenty-Four.

Eli Glassman (relied on for prejudice).

Eli Glassman testified to nothing at all directed to Count 24 (1964 tax), but this vigorously proffered testimony demonstrates the quality of proofs made in the case of this defendant. The following all occurred in front of the jury:

"[Do you recognize your signature on] Exhibit 30 which is in evidence, a check dated the

10th of May, 1963, payable to cash for $2,000, signed by Theodore Briskin, and the endorsement appears to read Ely Glassman. A. I do.

Q. Now, Mr. Glassman, did you ever win $2,000 from Ted Briskin? A. I don't ever recall winning that kind of money from him.

Q. Do you recall the circumstances under which you endorsed this check? A. Yes. If my memory serves me right, I was asked to cash this check for one of the members of the club and I cashed it. I went to my bank and cashed it.

Q. And gave him the $2,000? A. And gave him the $2,000 in cash.

Q. Mr. Glassman, who was the member of the club that asked you to do that? A. *I am not positive, but I did cash some checks for Ricky Jacobs, but I am not positive that this is one of the checks I cashed for him* [R. T. 4827, 2828].

Stricken as conjecture" [R. T. 4828, line 17].

"Q. On how many occasions, Mr. Glassman, did you cash checks for Ricky Jacobs? [R. T. 4828/21-22].

Objection.

Five pages of argument, containing the following representations:

Mr. Uelmen: His testimony which was struck was that he was not positive, *but he thought this* was one of three checks he had cashed. [Refer above]

Mr. Morgan: Does he have the other two?

Mr. Uelmen: We don't have.

Mr. Morgan: Do you have the amounts?

Mr. Uelmen: I think he said—I am not sure —I think he said one was as high as five thousand." [R. T. 4834]. [Refer below]

"I will say, Mr. Morgan, that if this man testifies at the Friars Club Jacobs had *in his hand a*

check for as much as $5,000 that he wanted cashed, I think this witness—it is relevant and permissible to have this witness so testify." [R. T. 4835].

At length,

"The Court: Yes. Let's find out with respect to the period of time.

Mr. Uelmen: All right.

Q. Mr. Glassman, during the period 1964, did you have occasion to cash checks for Mr. Jacobs, which Mr. Jacobs gave you at the Friars Club without endorsing? A. I don't recall the year. The year is difficult for me to recall [R. T. 4838].

The witness was allowed to testify within a 3 year range [R. T. 4838, 4839] as to two or three checks.

Voir Dire:

In a three year period, 1963, 1964 and 1965, he may have cashed two or three checks for Mr. Jacobs; he could not recall the exact year or month he cashed checks. He thinks he did in 1964 and does not remember if it was one or two in 1965. He knows the name of no maker; there was an amount of the check but he does not recall what it was [R. T. 4840, 4841].

The Court, referring to the Court's reasonable expectation for "in hand" testimony in a particular amount:

"The Court: Do I correctly understand, Mr. Glassman, that during this three-year period, at some time or other during that period you recall having in your hand a check that Mr. Jacobs gave you, which check was in a particular amount?

The Witness: Not in any particular amount.

The Court: You can't remember?

The Witness: I can't remember any particular amount." [R. T. 4840].

One page argument, attempting to inquire as to *approximate* amount [R. T. 4842, 4843].

"The Court: I am going to sustain that. He can't remember having seen the amount of the check. If he can't remember having seen the amount, why, he certainly can't remember any approximate amount.

By Mr. Uelmen:

Q. For example, I would like to ask, were these checks for over $1,000.00?

Mr. Morgan: I will object, your Honor, leading and suggestive and it calls for conjecture on the part of the witness, absolutely.

Mr. Uelmen: Well, do you recall, Mr. Glassman, whether they were for in excess of $1,000.00?

Mr. Morgan: I object on the ground it calls for a conjecture.

The Court: Well, no. Overruled." [R. T. 4843, 4844].

For what it was worth, it went in 2 pages later, after argument [R. T. 4846].

And, as the witness was responding to an inquiry from the court:

"The Court: Do I understand from that answer that, other things being equal, an excellent gin player would likely be an excellent klab player?

The Witness: Yes, your Honor.

By Mr. Uelmen:

Q. Incidentally, do you know whether Mr. Jacobs acquired his reputation as an excellent gin player through the use of peekholes?" [R. T. 4934].

William C. Quealy testified he was formerly an employee of the business managers of Phil Silvers [R. T. 4958, 4959] and had occasion to manage bank accounts of Mr. Silvers. It was customary in paying the

gambling debts for Mr. Silvers to call me and ask for a check to be brought to him, he would sign it and I would take it to the bank and endorse it and return the money to him." [R. T. 4959]. Exhibits 73 A through L are my endorsements [R. T. 4961, 4962]. The cash I obtained from those checks, some I would take to the Friars Club, some to Mr. Silvers' residence on Alpine Drive and some to him at the Hillcrest Country Club and other times he would come by the office and pick up the cash I had ready [Over objection], I gave Mr. Jacobs money twice, once in my office [R. T. 4963] and once in the lobby of the City National Bank Building in Beverly Hills [R. T. 4964]. [8]

Mr. Qualey, of course, could never testify beyond the above facts. The checks were introduced, however, as identified by Qualey. The account was the joint of Phil or Evelyn Silvers, used to pay other things [R. T. 5158, 14. R. T. 5656]; his last testimony on cross-examination on his third appearance was that it was true he could not testify that he gave the proceeds of any one of those checks to Mr. Jacobs, but the proceeds of the checks at one time came through his hands and that it was his custom to endorse the checks and cash them for Mr. Silvers to pay his gambling debts in cash and to use the mash to gamble [R. T. 5657].

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[8] It was so much desired to elicit that on the second occasion a check was first proffered and Mr. Jacobs allegedly desired cash that the questions were asked in the awkward, compound form appearing at 4964/2-4; 15-16; another long and prejudicial exchanged occurred in front of the jury; The testimony was stricken; it was then represented to the Court that the account was used *solely to pay gambling debts* [R. T. 4965, 66, 67], to avoid immaterial objection. The Court: "If Silvers said, 'Draw a check from my gambling account'" [R. T. 4969]. This was untrue [R. T. 5158/14]. The exchange continued and during the same the Government represented Silvers will testify that the checks to Mr. Jacobs were in payment of gambling losses, some card games and some form of bets [R. T. 4978]. He did not (see below). Qualey was recalled [R. T. 5160-5173] and again recalled [R. T. 5649-5667].

Phil Silvers testified from 1963 to 1965 he went to the club quite often, conservative estimate would be at least three times a week; he played a game called klabiash and mostly pinochle; scattered over three years, he played klabiash with Mr. Jacobs about five or six times [R. T. 5114]. It was his impression he lost; he paid in cash, or when he was out of cash, by check [R. T. 5114]. His largest loss would be about $4,500. "I wish I could be more specific. I am in a fog about it." [R. T. 5115-5116]. He testified, as to the amount of his total klabiash losses, "I guess this is no place to make a guess, but I would say [objection; witness advised he can estimate] I would say about $6,500.00."

Exhibits 74 A through H are his signatures, and 73 A through D and 73 E through H and J and K and L are signed by him [R. T. 5118, 5119]. From looking at the checks, there is really no way of identifying them because they were endorsed by Qualey—he evidently did that and had him get the cash [R. T. 5120-5121]; he gambled so much he really didn't know if his losses from klabiash were among the checks [R. T. 5121].

The Government made the following offer of proof: If asked whether the checks are gambling losses to Mr. Jacobs, the Government excepts him to say "Yes" because he so identified them in the Grand Jury [R. T. 5122].

(This is a serious misstatement; every figure mentioned in the Grand Jury was a guess; he had no checks; he identified no checks, "I'm only guessing.")

He was actually then asked: To your best recollection are the 1964 checks one of the funds of which you gave to Mr. Jacobs as payment for gambling losses [R. T. 5128]. OBJECTION OVERRULED [R. T. 5133].

> "*My recollection is I guess they were.*" [R. T. 5135/17].

The witness was instructed he could not guess, but could testify as to his best recollection [R. T. 5135-5136].

Voir Dire:

I don't recall ever handing a check to Mr. Jacobs; when I won, I received cash direct [R. T. 5137]; I would have these checks cashed and I would carry the cash to cover my gambling losses or perhaps even cash a check after some event or game and pay off in cash [R. T. 5138]. Some of the checks may have covered pinochle games and it sounds logical that some might have been cashed so I would have cash to pay off more than one person, but I don't recall [R. T. 5138]; I have no recollection of taking any one of those checks and giving it to Mr. Jacobs, not personally, no [R. T. 5138].

The question was allowed to be repeated. This time the witness answered:

"To the best of my recollection, yes."

On cross-examination he was asked "so far as this phrase 'best recollection' is it true you cannot take any" . . . one check and so testify?

"The very amount of one check (for $3,300) I would say *to the best of my recollection and honestly swear*, that it went to Mr. Jacobs (because of the amount)" [R. T. 5141].

See test of memory, Reporter's Transcript page 5142.

Outside of that there is no one check that he can point to that is before him that was the result of any card game. The card game he usually played was pinochle, with a particular group set forth by name [R. T. 5144]; it was more or less a set game every afternoon, if you would come up and the game was in session, you would be in it. On occasion, once in a great while,

he played a game of klabiash with Mr. Jacobs, and those spanned a number of years.

The cross-examination continues as to other games, other players, other uses of funds, other bets [R. T. 5144, 5145, 5146, 5147, 5148], lack of recollection, lack of knowledge [R. T. 5149, 5150, 5151], above subjects and compulsive gambling, winning streaks, pinochle [R. T. 5152, 5153, 5154].

The Phil Silvers Special Account is not used solely for gambling [R. T. 5158].

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteenyears and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on NOVEMBER 29TH 1970, I served the within PETITION FOR WRIT OF CERTIORARI (USA v. Jacobs) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543

I declare under penalty of perjury that the foregoing is true and correct.

Executed on NOVEMBER 29TH 1970, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

D. A Standefer

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1020

BENJAMIN TEITELBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1029

JOHN ROSELLI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1034

MANUEL JACOBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a six-month jury trial in the United States District Court for the Central District of California, petitioners were convicted of various offenses arising out of participation in an organized scheme to cheat for profit in card games played at the Friars Club in Beverly Hills, California. The essence of the scheme was to induce persons to join in high stake card games and, while the games were being played, to station observers at ceiling peepholes who transmitted playing instructions to confederates by way of electronic signalling devices.

Each petitioner was convicted of conspiracy to violate 18 U.S.C. 1952 (use of interstate facilities for unlawful gambling enterprise), 18 U.S.C. 2314 (interstate transportation of stolen securities) and 26 U.S.C. 7206(1) (filing a false income tax return by failing to report monies obtained from the scheme); each was also found guilty of at least one substantive violation of Section 1952, through use of the telephone and interstate travel, and of substantive violations of Section 2314 through transportation of checks obtained from the card games to and from Las Vegas (see Pet. No. 1020, App. 2). In February, 1969, Teitelbaum and Jacobs were sentenced to imprisonment for terms totalling four years and Roselli was sentenced to terms totalling five years; fines in varying amounts were also imposed. The court of appeals affirmed in a comprehensive opinion which sets forth the relevant facts and discusses in extensive detail the major contentions asserted by petitioners in this Court (Pet. No. 1020, App. 1-36). In the main, we rely upon that opinion; we believe it appropriate, how-

ever, to address ourselves to certain of the contentions raised by petitioners.[1]

1. Petitioners assert that the court of appeals erred in ruling that, in order to hold a defendant liable as a conspirator, it was not necessary for the government to show that he knew of or reasonably could be held to anticipate the interstate aspects of the agreement (Pet. No. 1020, App. 13-16); this, it is said, is contrary to the orthodox view that the federal element must be within the contemplation of the conspiracy.[2] *Pereira* v. *United States*, 347 U.S. 1, 11-12. The different analysis adopted below, however, does not warrant the granting of certiorari in view of the court's alternative ruling that the evidence was sufficient to show actual knowledge or reasonable contemplation that interstate facilities and interstate travel would be involved.[3] Indeed, this was the basis

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[1] The petition in No. 1034 (Jacobs) is out of time under Rule 22(2) of the Rules of this Court, having been filed 31 days after the denial of the petition for rehearing.

[2] But see our discussion in our Memorandum in Opposition in *United States* v. *Blassingame*, 427 F. 2d 329 (C.A. 2), petition for certiorari pending, No. 5562, involving the Second Circuit's view as to the proof necessary to make out an offense under the mail fraud statute (18 U.S.C. 1342). We are providing counsel for petitioners with a copy of our Memorandum in *Blassingame*.

[3] Although the court of appeals specifically dealt in detail with knowledge in this regard only as to petitioner Teitelbaum (Pet. No. 1020, App. 16-18), the court's opinion indicates, as the trial evidence shows, that the other petitioners were actually aware or could reasonably be presumed to be aware of the interstate elements of the agreement (see Pet. No. 1020, App. 21-22).

upon which the case was tried and the trial court's instructions unequivocally directed the jury that to convict on the conspiracy charges it had to find "knowledge" regarding the interstate aspects of the scheme.* This instruction complied with the principle stated in *Pereira* v. *United States*, 347 U.S. 1, 8-10; see also, *Nassif* v. *United States*, 370 F. 2d 147, 152-153 (C.A. 8); *United States* v. *Mingoia*, 424 F. 2d 710, 712 (C.A. 2); no conflict has thus been created which this Court should resolve.

2. The contention that the card cheating enterprise did not come within the proscription of Section 1952 because it was not a business enterprise involving gambling under California law was thoroughly canvassed and properly rejected by the court below (Pet. No. 1020, App. 3-9). We add that there is no reason to defer disposition of the instant petitions because of

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* The trial judge instructed on the conspiracy charge (count one) as follows (Tr. 703-704):

> With respect to [the conspiracy count] it is not sufficient for the Government to prove that one or more of the defendants agreed to participate in, or to become a member of, a conspiracy to cheat at cards at the Friars Club. That isn't enough. Before a defendant may be found guilty of Count One of the indictment, the Government must prove that such defendant specifically agreed to the use of illegal interstate facilities, or directly agreed to a scheme which could not be consummated without the use of illegal interstate transportation or facilities, or agreed to a scheme in which it was shown that the likelihood of the use of illegal interstate transportation or facilities was great, • • • or that he evidenced his indirect agreement by substantial participation in the scheme with actual knowledge of the proposed or completed use of illegal transportation or facilities.

the grant of certiorari in *Perez* v. *United States* or *Rewis* v. *United States*, Nos. 600 and 5342 respectively, this Term. *Perez* deals with a totally different statutory scheme where Congress sought by formal findings to avoid the requirement of proof in each individual case that there had been an effect on commerce; *Rewis* involves the entirely different issue of whether, in the particular circumstances of that case, petitioners induced the interstate travel of others to a gambling establishment. Nor is *United States* v. *Nardello*, 393 U.S. 286, inconsistent with the ruling below (Pet. No. 1029, pp. 11-12). Indeed, in *Nardello*, this Court cut through form to substance to give the statutory provision its intended reach.

3. The other individual claims of the petitioners are also fully treated in the opinion below and justify but summary comment.

a. The government introduced telephone toll records reflecting interstate calls between petitioner Jacobs' residence in Los Angeles and locations of other members of the conspiracy during its pendency. In view of the other evidence of record tying Jacobs to the conspiracy, the court below concluded that the jury was properly permitted to consider that the calls were made by Jacobs and related to the conspiracy (Pet. No. 1020, App. 22-23). Petitioner Jacobs now contends that the admission of the toll records violated Section 605 of the Federal Communications Act (47 U.S.C. 605). The decisions are, however, uniformly to the contrary. *United States* v. *Covello*, 410 F. 2d 536, 540-542 (C.A. 2) and cases cited, certiorari denied, 396 U.S. 879; see also *Nolan* v. *United*

States, 423 F. 2d 1031, 1043-1045 (C.A. 10); *DiPiazza* v. *United States*, 415 F. 2d 99, 101-103 (C.A. 6), pending on petition for a writ of certiorari, No. 67, this Term.

The cases from the Ninth Circuit relied on by petitioner (*United States* v. *Johnson*, 429 F. 2d 430, and *Osborne* v. *United States*, 371 F. 2d 913) do not deal with Section 605 but with the argument, properly rejected below, that there was insufficient evidence to identify the caller or recipient.[5]

b. Petitioner Roselli contends (Pet. No. 1029, pp. 15-17) that the district court erred in deferring, until after the trial, the hearing on his motion to suppress evidence on grounds of illegal electronic surveillance; he also argues that there were various infirmities in the hearing on that issue. In rejecting this claim, the court of appeals relied on its prior decision (set forth in pertinent part in Pet. No. 1029, 51a-54a) involving a separate conviction of petitioner in which it rejected essentially the same claims (Pet. No. 1029, p. 47a). In a recent case identical arguments were rejected by the Ninth Circuit and this Court denied certiorari. *United States* v. *Sacco*, 428 F. 2d 264, 272-274 (C.A. 9), certiorari denied, November 9, 1970 (No. 556, this Term).

c. Petitioner Teitelbaum's claims of error (Pet. No. 1020, pp. 25-43) regarding government cross-examination of certain of his witnesses are amply

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[5] Jacobs' claim of prejudicial joinder (Pet. No. 1031, 10-18) is fully answered by the court below (Pet. No. 1029, App. 25-31) and requires no discussion here.

answered below. It is further claimed that the jury was improperly informed of the fact that two witnesses subpoenaed by the government had claimed the privilege against self-incrimination. As the court below stressed, there is not the slightest evidence of a prosecutorial attempt to build its case in this fashion or of prosecutorial misconduct. The court below disapproved, as a general matter, questioning a witness before the jury after he claims the privilege or advising the jury of a claim asserted outside its presence. It found, however, no reversible error in the circumstances of this case (see Pet. App. 1020, App. 31-34). This assessment of a particular factual context should provide no occasion for plenary review.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

SUPREME COURT, U.S.
FILED
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E. ROBERT SEAVER, CLERK

Supreme Court of the United States

October Term, 1970

UNITED STATES OF AMERICA,

Respondent,

vs.

MANUEL JACOBS,

Petitioner.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

PETITION FOR REHEARING

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NO. 1034

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

UNITED STATES OF AMERICA,

Respondent,

vs

MANUEL JACOBS,

Petitioner

On Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on February 22, 1971, and (2) granting the petition. As grounds for this motion, petitioner states the following:

One of the questions raised by petitioner in his original petition concerned the proper use of telephone toll records (Petition at pp 18-21) As noted by the Solicitor General

(Memorandum at p. 6), there is currently before this Court a petition which appears to raise precisely the same question. *Di Piazza v. United States*, 415 F.2d 99 (6th Cir. 1969), docket number 67. That case was originally docketed in December of 1969. 39 L.W. 3018.

Petitioner respectfully maintains that the denial of his petition is inconsistent with the action of the Court in *Di Piazza*. *See, Shipley v. California*, 395 U.S. 818 (1969) (White, J., dissenting).

CONCLUSION

For the reason set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and opinion below.

Respectfully submitted,

BURTON MARKS, ESQ.
of
MARKS, SHERMAN, LONDON, SCHWARTZ & LEVENBERG

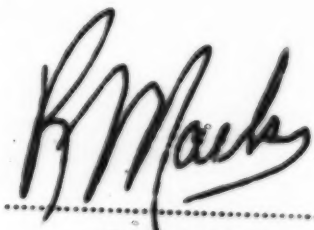
and

MORGAN, WENZEL, LYNBERG, STEARNS and MORRIS

Attorneys for Petitioner Jacobs

CERTIFICATE OF COUNSEL

The undersigned counsel for petitioner certifies that this petition for rehearing is presented in good faith and not for the purpose of delay.



Burton Marks

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on MARCH 24, 1971, I served the within PETITION FOR REHEARING (USA v. Jacobs – No. 1834) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH 24th, 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer